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IN THE

Supreme Court of the United States

October Term, 1967
No. 1373 Misc.

PROBRO, INC., dba LAKEWOOD CLUB,

Petitioner,

vs.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

BRIEF FOR RESPONDENT IN OPPOSITION

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SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	1
Statement of Questions Presented	1
Statement of the Case	3
Argument	5
I	
The Claim That the Proceedings Against Petitioner Violated Due Process of Law Does Not Raise Any Substantial Federal Questions	5
A. This Case Does Not Involve Free Speech	5
B. Article XX, Section 22, of the California Constitution Is Sufficiently Specific to Delegate Administrative Authority	6
II	
The Enforcement of the Department's Decision Will Not Deny Petitioner Equal Protection of the Laws	10
III	
The Decision of the Department Does Not Constitute the Exercise of Unauthorized Powers of Censorship	10
Conclusion	11

TABLE OF AUTHORITIES CITED

Cases	Page
Adler v. Department of Alcoholic Beverage Control, 174 Cal. App. 2d 256	8
American Power Co. v. Securities & Exchange Commission, 329 U.S. 90	7
Bandini Co. v. Superior Court, 284 U.S. 8	7
Board of Education v. Barnette, 319 U.S. 624	6
Cornell v. Reilly, 127 Cal. App. 2d 178	8
Cox v. New Hampshire, 312 U.S. 569	7
Giacco v. Pennsylvania, 382 U.S. 99	5
Jacques, Inc. v. State Board of Equalization, 155 Cal. App. 2d 448	8
Jordan v. De George, 341 U.S. 223	8
Kershaw v. Department of Alcoholic Beverage Control, 55 Cal. App. 2d 544	8
Koningsberg v. State Bar of California, 366 U.S. 36	11
Martin v. Alcoholic Beverage Control Appeals Board, 55 Cal. 2d 867	9
Mercurio v. Department of Alcoholic Beverage Control, 144 Cal. App. 2d 626	8
Musser v. Utah, 333 U.S. 95	7
People v. Western Airlines, 42 Cal. 2d 621	10
Presto v. Alcoholic Beverage Control Appeals Board, 179 Cal. App. 2d 262	8
Prince v. Massachusetts, 321 U.S. 158	11
Roth v. United States, 354 U.S. 476	6

Page

Stouman v. Reilly, 37 Cal. 2d 713 9

Stromberg v. California, 283 U.S. 359 6

Thornhill v. Alabama, 310 U.S. 88 6

United States v. Harriss, 347 U.S. 612 11

Vallerga v. Department of Alcoholic Beverage Control, 53 Cal. 2d 313 9

Statutes

California Business and Professions Code, Sec. 23090 4

California Business and Professions Code, Sec. 24200(a) 3

California Constitution, Art. XX, Sec. 22 ....2, 3, 6, 7

California Government Code, Sec. 11502 3

California Government Code, Sec. 11503 3

California Government Code, Sec. 11512 3

California Government Code, Sec. 11517(b) 3

United States Constitution, First Amendment 2, 5, 6, 11

United States Constitution, Fourteenth Amendment 1, 2

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Opinions Below

There were no written judicial opinions below. The Court of Appeal for the State of California denied without opinion the Petition for Writ of Mandate. (Appendix D of Petition.) Similarly, the Supreme Court of the State of California denied without opinion the Petition for Hearing filed herein. (Appendix E of Petition.)

Jurisdiction

Respondent adopts the jurisdictional statement set forth in the Petition.

Statement of Questions Presented

1. Was it a violation of the Due Process Clause of the Fourteenth Amendment for the Department of Al-

coholic Beverage Control to suspend Petitioner's license to sell alcoholic beverages upon the ground that petitioner had engaged in conduct which was "contrary to public welfare or morals," as that phrase is used in Article XX, Section 22, of the Constitution of the State of California and as that phrase has been applied by the courts of the State of California?

2. Does the Due Process Clause of the Fourteenth Amendment require that decisions of the Department of Alcoholic Beverage Control of the State of California be based upon a record which must include evidence specifically demonstrating the manner in which the conduct complained of is contrary to public welfare or morals?

3. Is it a denial of equal protection of the laws under the Fourteenth Amendment for the Department of Alcoholic Beverage Control of the State of California to enforce an order suspending Petitioner's license which has been affirmed by the Supreme Court of California when the lawfulness of action taken by the Department in other similar cases is still the subject of litigation pending in the lower courts in California?

4. Is the following conduct protected by the provisions of the First Amendment respecting free speech: Petitioner operated a beer bar in which the women who tended bar and waited on patrons wore costumes which fully exposed their breasts to public view (colloquially known as "topless waitresses"). If such conduct is in the nature of speech protected by the First Amendment does the Department of Alcoholic Beverage Control of the State of California have authority to determine that such conduct should not occur in a place where alcoholic beverages are sold and consumed?

Statement of the Case

The only case which is the subject of the Petition is the case which was the subject of the decision reproduced in Appendix A of the Petition.

The case commenced on November 30, 1966, with an administrative Accusation filed pursuant to section 11503 of the Government Code of the State of California. The Accusation alleged that on specified dates Petitioner had employed named females to tend bar and wait on patrons while attired in described costumes which exposed their breasts to public view. The Accusation further alleged that the described conduct was contrary to public welfare or morals within the meaning of Article XX, Section 22, of the Constitution of the State of California and section 24200(a) of the Business and Professions Code of the State of California and was cause for the suspension or revocation of Petitioner's license to operate a premises in which beer could be sold and consumed.

On February 21, 1967, the Accusation duly came on for hearing before a hearing officer of the California Office of Administrative Procedure, pursuant to sections 11502 and 11512 of the Government Code of the State of California. Petitioner was represented at the hearing by his attorney, who stipulated that the facts alleged in the Accusation were true. No further evidence was submitted by either party.

On March 14, 1967, the hearing officer submitted a proposed decision to the Department pursuant to section 11517(b) of the Government Code of the State of California. (Petition; Appendix A.) The proposed decision, which recommended that Petitioner's license

be suspended for thirty days, was adopted by the Department without modification on April 20, 1967. (Petition, Appendix B.)

Petitioner appealed the decision of the Alcoholic Beverage Control Appeals Board which, on November 2, 1967, entered its opinion affirming the decision. (Petition, Appendix C.)

Petitioner then filed a petition for writ of mandate (which should have been denominated a petition for writ of review) in the Court of Appeal for the State of California pursuant to section 23090 of the Business and Professions Code of the State of California. The Court denied the petition on January 2, 1968. (Petition, Appendix D.)

Petitioner then filed a petition for hearing in the California Supreme Court, which was denied on January 31, 1968. (Petition, Appendix E.)

The case whose history has been set forth above is the only case which is the subject of the Petition for Writ of Certiorari. The Petition also relates the history of a prior Accusation which had been filed on May 6, 1966, and which was the subject of the Judgment entered by the Superior Court for the County of Los Angeles reproduced as Appendix I of the Petition and the Findings of Fact and Conclusions of Law reproduced as Appendix H. That case is still pending, inasmuch as the Department filed a Notice of Appeal to the Court of Appeal of the State of California on March 25, 1968.

ARGUMENT

I

The Claim That the Proceedings Against Petitioner Violated Due Process of Law Does Not Raise Any Substantial Federal Questions

A. This Case Does Not Involve Free Speech

This case involves the lawfulness of an order by the Department of Alcoholic Beverage Control of the State of California suspending Petitioner's license to sell beer at retail for consumption on the premises. It should be noted at the outset that Petitioner raises no question concerning the procedure followed below. It is unquestioned that Petitioner received adequate notice of the charges against it and was accorded a full opportunity to defend itself at the administrative hearing. Rather, Petitioner's argument is concerned with the validity of the constitutional authority upon which the Department's decision was based.

Petitioner is apparently of the opinion that this is a case involving free speech, since all the cases cited in its Petition but one (*Giacco v. Pennsylvania,* 382 U.S. 99) are cases decided under the First Amendment. But there is nothing in this record to indicate that the exercise of speech is anywhere involved. This case does not involve any books, plays, photographs, moving pictures, magazines or stage shows. The women who served beer and waited on patrons in Petitioner's licensed premises were not performers or entertainers. The only manner in which they differed from ordinary waitresses is that they wore costumes which left their breasts completely uncovered.

There is nothing in the record to indicate that the waitresses employed by petitioner were engaged in sym-

bolizing or communicating any ideas. *E.g. Board of Education v. Barnette,* 319 U.S. 624 (saluting the flag as a patriotic gesture); *Stromberg v. California,* 283 U.S. 359 (carrying a flag as a symbol of anarchy); *Thornhill v. Alabama,* 310 U.S. 88 (informational picketing).

Since free speech is not involved, the question of obscenity is irrelevant. For the definition of obscenity has been tailored to distinguish speech which is protected by the First Amendment from speech which is not protected by the First Amendment. *Roth v. United States,* 354 U.S. 476, 481-85. Thus, it is literally meaningless to assert that mere conduct, which possesses none of the attributes of speech, is not obscene, just as it would be literally meaningless to assert that Petitioner (a corporation) is not six feet tall.

> "I assume there is nothing in the Constitution which forbids Congress from using its power over the mails to proscribe *conduct* on the grounds of good morals. No one would suggest that the First Amendment permits nudity in public places, adultery, and other forms of sexual misconduct." *Roth v. United States,* 354 U.S. 476, 512. (Dissent of Mr. Justice Douglas.)

B. Article XX, Section 22, of the California Constitution Is Sufficiently Specific to Delegate Administrative Authority

Since this case does not involve the exercise of First Amendment rights, those cases in which statutes impinging upon free speech have been declared unconstitutionally vague are equally inapplicable. The provisions of Article XX, Section 22, herein applicable do

not create any crimes. Thus, to the extent that any due process question might be raised by the text of Article XX, Section 22, of the California Constitution, the question would be whether the delegation of authority to an administrative agency is so broad or uncertain as to violate due process. *American Power Co. v. Securities & Exchange Commission,* 329 U.S. 90, 105. And it is established by cases such as *American Power* that a lesser degree of specificity is required in statutes delegating administrative authority than in statutes defining criminal offenses.

This case does not raise any substantial federal question concerning the delegation of authority to the California Department of Alcoholic Beverage Control. Petitioner approaches the question as though the offending phrase were perched barren and unattended in the State Constitution. In fact, its definition has been established by the manner in which it has been applied in numerous cases decided in the courts of California, which this Court must take into consideration. *Musser v. Utah,* 333 U.S. 95, 97; *Cox v. New Hampshire,* 312 U.S. 569, 575; *Bandini Co. v. Superior Court,* 284 U.S. 8, 18.

The phrase "contrary to public welfare or morals" has never been expressly defined in California. However, the California Department of Alcoholic Beverage Control and its predecessor, the State Board of Equalization, has been authorized to deny, revoke or suspend licenses on those grounds since the repeal of prohibition. In the ensuing thirty-five years there have been numerous cases in which the courts have had to decide whether the Department had abused its discretion in determining if conduct or conditions were contrary to

public welfare or morals, but in none of these cases have the courts questioned the specificity of the delegation of authority. See *Jordan v. De George,* 341 U.S. 223, 230.

A large number of prior cases have supported the authority of the Department to suspend or revoke in cases in which the licensee has permitted excessive sexual conduct or has unduly exploited sex to promote the sale and consumption of alcoholic beverages. Among those cases are *Jacques, Inc. v. State Board of Equalization,* 155 Cal. App. 2d 448, in which the licensee put on lewd shows with live "entertainers" and exhibited films, both of which portrayed acts of sexual intercourse and nude women performing "lewd, obscene and immoral dances:" *Presto v. Alcoholic Beverage Control Appeals Board,* 179 Cal. App. 2d 262, in which the licensee permitted prostitutes to solicit customers in the licensed premises; *Kershaw v. Department of Alcoholic Beverage Control,* 155 Cal. App. 2d 544, in which patrons engaged in acts of sexual gratification in public view; *Cornell v. Reilly,* 127 Cal. App. 2d 178, in which female employees solicited male customers to purchase drinks for them; and *Mercurio v. Department of Alcoholic Beverage Control,* 144 Cal. App. 2d 626, in which the court upheld an administrative rule that it was contrary to public welfare or morals for female employees of a licensee to either solicit or accept drinks from patrons. The case most directly in point is *Adler v. Department of Alcoholic Beverage Control,* 174 Cal.

App. 2d 256, in which two clothed taxi dancers briefly displayed their breasts to customers, which is to be contrasted with the females employed by Petitioner, whose breasts were uncovered throughout the entire time that they were serving and waiting upon patrons. In view of these cases there is no merit to Petitioner's contention that the law gave no notice and provided no standard upon which the Department could act.

It should be observed that the Department does not have *carte blanche* to act at whim in exercising its discretion to determine if conduct is contrary to public welfare or morals. The California Constitution requires that the Department's action be based upon "good cause." This means that "its decisions should be based upon substantial evidence and it should not act arbitrarily in determining what is contrary to public welfare or morals." *Martin v. Alcoholic Beverage Control Appeals Board,* 55 Cal. 2d 867, 876. Among the cases in which decisions of the Department have been reversed because the conduct was held, as a matter of law, not to be contrary to public welfare or morals are *Stoumen v. Reilly,* 37 Cal. 2d 713, 717, in which the evidence only established that homosexuals patronized a restaurant but did not establish that any illegal or immoral acts occurred there, and *Vallerga v. Department of Alcoholic Beverage Control,* 53 Cal. 2d 313, in which the court held unconstitutional a statute authorizing the Department to revoke a license if it found that the premises were a resort for illegal possessors of nar-

cotics, prostitutes, pimps, panderers, or sexual perverts solely upon evidence of general reputation and without requiring evidence of specific acts on the premises.

II

The Enforcement of the Department's Decision Will Not Deny Petitioner Equal Protection of the Laws

The theory behind Petitioner's contention is somewhat obscure. It was not expressly raised in the State courts and is not explained in the Petition.

The instant Petition seeks review of decisions of the California Supreme Court and Court of Appeal denying Petitioner's petition for a writ of review. Under California law, such denials amount to a decision on the merits affirming the decision of the Department as to all issues, even though the decision is made without opinion. *People v. Western Airlines,* 42 Cal. 2d 621, 630. Respondent knows of no principle which would prevent the Department from enforcing a decision which has been affirmed by the highest court of the State merely because lower courts have made conflicting decisions in other cases which are still pending on appeal.

III

The Decision of the Department Does Not Constitute the Exercise of Unauthorized Powers of Censorship

The third reason advanced by Petitioner for granting the writ is extraordinarily baffling. We cannot tell what point the Petition is trying to make.

If the claim being advanced is that the Department exceeded the scope of authority delegated to it by the

State, the question would not seem to involve any Federal Constitutional Rights. Petitioner's argument that the decision has nothing to do with the regulation of the sale of alcoholic beverages is incomprehensible in view of the fact (stipulated to by petitioner) that the conduct in question occurred in connection with the sale and consumption of beer at Petitioner's licensed premises.

Petitioner may be trying to raise a question involving free speech, in view of its assertion that the decision amounts to a prior restraint. We have already demonstrated that the instant case does not involve the exercise of any rights protected by the First Amendment. Even if it did, the State would have authority to regulate the exercise of such rights in connection with its regulation of the sale and consumption of alcoholic beverages. *Cf. Koningsberg v. State Bar of California,* 366 U.S. 36, 50; *United States v. Harriss,* 347 U.S. 612, 625; *Prince v. Massachusetts,* 321 U.S. 158.

Conclusion

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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